

### REMARKS

Reexamination and reconsideration of this application is respectfully requested in light of the following remarks.

Claims 37 and 44-59 are pending in this application. Claims 1-36 and 38-43 were previously canceled. Claim 37 stands withdrawn from consideration due to a restriction requirement. No claims have been added by this amendment. It is proposed to amend claim 45 to correct an obvious error in the dependency of the claim. Claim 45 was dependent on claim 1, which had been previously canceled prior to the final Office Action. It is proposed to amend claim 45 to be properly dependent on base claim 44. The amendment does not raise an issue of new matter or require new consideration and search since it is evident from the final Office Action that the Examiner regarded claim 45 as being dependent on claim 44. It is requested that the proposed amendment be entered.

Applicant appreciates the personal interview granted by the Examiner on May 27, 2008. In the interview, the history of the development of the claimed subject matter was presented by the inventor and a demonstration was made with the Examiner of Applicant's product, which is within the scope of the claims. Arguments were presented as to why the references applied in the rejection, when taken alone or in combination, fail to teach or suggest the claimed subject matter. Also, the Trahan Declaration was discussed. The Examiner maintained during the interview that the Declaration was insufficient because it was not commensurate in scope with the claimed subject matter.

### **Obviousness Rejection**

Claims 44-59 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Zabotto et al. (U.S. Patent No. 4,673,526) and Barker et al. (U.S. Patent No. 5,360,824) in view of Kellner (U.S. Patent No. 6,042,815), McAtee et al. (U.S. Patent No. 6,153,208), Stewart et al. (U.S. Patent No. 6,197,281), Geria (U.S. Patent No. 4,992,476), Daniel et al. (U.S. Patent No. 5,891,449) and Gagnebien et al. (U.S. Patent No. 5,888,951). The claimed composition has the following critical elements:

1. The emollient/salt ratio in the composition is required to be in the range of 4:1 to 2.5:1. These proportions claimed provide a stable, extrudable paste or cream.

2. The composition includes a non-irritating, mildly abrasive, skin compatible particulate material to effectively cleanse and lubricate the skin without abrading the skin. The particulate material in the composition must include both an abrasive material as well as 8% to 20% by weight of a starch material.

3. The amount of surface active agent is critical to stabilizing the composition and to leaving a thin film on the skin, but not leaving a greasy or tacky after feel after rinsing with water. It must be controlled within the claimed range so that it is effective to rinse the bulk of the composition from the skin after the composition is applied. If too little surfactant is present, too much fatty matter remains on the skin to leave a greasy and unacceptable after-fee. If too much surfactant is present, substantially all of the composition is removed from the skin when rinsed with water and a thin film of emollient is not left on the skin. See page 10, lines 4-27 of the specification. The claimed range of the amount of surface active agent is essential to the composition to provide the thin film of emollient that effectively softens, smoothes and

moisturizes the skin without leaving a greasy or tacky after-feel when the composition is removed from the skin with water and then dried.

4. The composition must contain a calcium or magnesium salt of a  $C_{14}$ - $C_{18}$  monocarboxylic acid.

The rejection is a combination of eight different references. It is Applicant's position that the combined teachings of the prior art relied upon in the Office Action would not have led a person of ordinary skill in the art to add and mix the various ingredients disclosed in the prior art in the percentages claimed to arrive at a composition that a person skilled in the art can be expected to provide soft, smooth and moisturized skin without a greasy or tacky after feel after rinsing with water.

According to the Examiner, Zabotto et al. teach a cleansing composition containing 50-95% oily phase, 1-30% of an emulsifying agent and 1-10% of particulate abrasives. The particulate abrasives of Zabotto et al. are described as "hydrosoluble," but are not disclosed to be mildly abrasive, but non-irritating as required by base claim 44. There is no teaching in the reference of mixing a starch with the particulate abrasives, also as required by base claim 44. There is also no teaching of adding a calcium or magnesium  $C_{14}$ - $C_{18}$  monocarboxylic salt within the claimed emollient/salt ratio range as recited in claim 44 to provide a stable, extrudable paste or cream. The reference further fails to teach or suggest the claimed range for the emulsifying agent so as to stabilize the composition and leave a thin film of emollient on the skin, without not leaving a greasy or tacky after feel after rinsing with water also as required by base claim 44.

As for Barker et al., this reference has similar deficiencies. Barker's composition is a cream composed of a 50-50 mixture of petroleum jelly and corn oil along with sodium chloride

particles. The reference does not disclose or suggest composition containing a surface active agent, a calcium or magnesium C<sub>14</sub>-C<sub>18</sub> monocarboxylic salt in the claimed emollient to salt ratio range, or a mixture of starch and other particulates as set forth in base claim 44.

The Office Action acknowledges the deficiencies in Zabotto and Barker. The Office Action states that these references "do not teach expressly the particular percentage of each and every ingredient herein claimed that, or the employment of particular ingredients, such as particular abrasive agents, particular oil, calcium stearate, or the employment of sodium chloride, pumice, kernel starch as particular ingredients, and sodium cocoyl N-methyl taurate as the surfactant." For these deficiencies, the Examiner relies on no less than six other references, none of which make up for the deficiencies of Zabotto and Barker.

Zabotto and Barker are oil based anhydrous cleansing compositions. The rejection relies on Kellner et al. as teaching solid, water and oil emulsion cosmetic composition. However, Kellner is not a stable, extrudable paste or cream cleansing composition as required by base claim 44. It has a consistency such that it can be molded in the form of a stick (col. 2, lines 7-11). Further, Kellner's composition contains a significant amount of water, 5-95% by weight and requires a both a primary and secondary gelling agents (col. 1, line 56 to col. 2, line 3). The percentage of water in Kellner's composition is higher than set forth in the claimed composition. Also, the amount of emollient oil in the composition is less than the minimum 35% required by base claim 44. Moreover, a person skilled in the art would not have looked to an aqueous composition to modify an anhydrous composition. In addition, while the reference lists calcium stearate can be a component of the composition, the calcium stearate is disclosed as being a gelling agent for water-oil emulsion composition, and not as a surfactant. There would be no

reason from the combined teachings of Kellner, Zabotto and Barker to modify either Zabotto or Barker to add a gelling agent to the anhydrous compositions. Further, while Kellner discloses mixtures of starch and other particulates, the reference does not teach or suggest a starch/particulate mixture where 8% to 20% by weight of the 10% to 45% by weight of the particulate material is a starch material selected from the group consisting of starches and enzyme or acid hydrolyzed starches as required by base claim 44.

As for Geria, this reference discloses a water and oil skin cleansing composition containing 15% to 65% water, with amounts greater than 20% preferred. The amount of water in this composition far exceeds the 0% to 4% set forth in Applicant's base claim 44. Like Kellner et al, Geria requires an aqueous thickening or gelling agent. Because a gelling agent is required, one skilled in the art would not look to an aqueous composition requiring a gelling agent to modify an anhydrous composition. While Geria discloses pumice as a particulate material, pumice could not be substituted in Barker because Barker requires that the particulate be water soluble and absorbed by the skin. See col. 2, lines 52-58 of Barker. Geria's composition contains 5% to 9% a surfactant to leave an oil film on the skin that is "non-oily." See col. 3, line 55 to col. 4, line 15. However, there is no disclosure that such levels of surfactant would be expected to have the same effect in compositions having less than 15% water content. In addition, Geria does not disclose the inclusion of (i) a calcium or magnesium  $C_{14}$ - $C_{18}$  monocarboxylic salt to the composition or (ii) a starch/particulate mixture where 8% to 20% by weight of the 10% to 45% by weight of the particulate material is a starch material selected from the group consisting of starches and enzyme or acid hydrolyzed starches as required by base claim 44.

Stewart et al. teaches away from the claimed subject matter. Stewart et al. is directed to a sunscreen composition that is waterproof, i.e., the composition is not intended to be rinsed off with water after it is applied to remove the composition from the skin. See col. 3, lines 50-53. Accordingly, a person of ordinary skill in the art would not look to a sunscreen composition which is water proof to modify a cleaning composition of Zabotto and/or Barker which can be rinsed away with water. In addition, Stewart et al. do not disclose or suggest (i) that 8% to 20% by weight of the 10% to 45% by weight of the particulate material is a starch material selected from the group consisting of starches and enzyme or acid hydrolyzed starches or (ii) the addition of calcium or magnesium C<sub>14</sub>-C<sub>18</sub> monocarboxylic salt to the composition as required by base claim 44.

McAtee is not directed to a cleaning composition in the form of a cream or lotion. It is directed to a dry, disposable multilayered article impregnated with a dry cleaning composition to which water must be added in order to function. In addition, McAtee seeks to solve the problem of lather suppression caused by the addition of ingredients such as surfactants. See col. 1, line 68 to col. 2, line 15. Specifically to solve this problem, McAtee uses a combination “lathering surfactant” and conditioning component in his cleansing composition. See col. 4, lines 61 to 66. Even though McAtee’s composition could contain less than 5% by weight of water (col. 7, line 63 to col. 8, line 6), its cleansing properties require the addition of water to the impregnated composition in the multilayered article. See col. 7, lines 7-15. Also, the multilayered article itself is the exfoliate, and not a mixture of starch and particulate material as required by base claim 44. See col. 7, lines 15-22. McAtee also does not disclose or suggest the addition of calcium or magnesium C<sub>14</sub>-C<sub>18</sub> monocarboxylic salt to the composition as required by

independent claim 44. While McAtee broadly discloses a salt of cocoyl methyl taurate as a lathering surfactant, there is no disclosure of the amount of surfactant in the composition impregnated into the multilayered substrate. Claim 2 of the patent discloses the amount to be 0.5% to about 12.5% by weight of the water insoluble substrate, not of the impregnated composition. The disclosure of McAtee is a shotgun disclosure of many ingredients. None of the examples in the patent are directed to compositions containing a surfactant within the scope of base claim 44.

Daniel does not disclose an emollient composition. Therefore, a person skilled in the art would not look to Daniel to modify an emollient composition such as disclosed by Zabotto and/or Barker. In addition, the particulate material disclosed in Daniel are very fine particles, much finer than 100-800 $\mu$  particles disclosed in Barker and the 50-1000 $\mu$  particles disclosed in Zabotto et al. Further, the reference does not disclose or suggest a composition containing calcium or magnesium C<sub>14</sub>-C<sub>18</sub> monocarboxylic salt to the composition and 0.4% to 8.0% by weight of a surface active agent to form a stable composition and to leave a thin film of emollient material on the skin as required by base claim 44.

Gagnebien discloses a cleansing composition that contains an oil component such as macadamia oil and a surfactant. However, the surfactant is a foaming surfactant. Further, the reference fails to disclose a calcium or magnesium salt of a carboxylic acid or an exfoliate particulate material selected from the group consisting of sodium chloride, pumice, talc and vegetable flour as required by base claim 44. The reference also does not disclose the amount of exfoliant to contain 8% to 20% by weight of a starch material in addition to the particulate material. While Gagnebien's composition includes a surfactant, it is a foaming surfactant. The

claimed product uses a surface active agent that forms a stable composition and leaves a thin film of emollient material on the skin. A foaming surface active agent would not be expected to leave a thin layer of emollient material on the skin. Further, base claim 44 requires that a stable, extrudable paste or cream is formed. A foaming agent would not provide a stable, extrudable paste or cream.

For all of the foregoing reasons, the combination of references relied upon by the Examiner, taken alone or in combination, do not present a *prima facie* case of obviousness with respect to base claim 44. Under Federal Circuit guidelines, a dependent claim is nonobvious if the independent claim upon which it depends is allowable because all the limitations of the base claim are contained in the dependent claims. *Hartness International Inc. v. Simplimatic Engineering Co.*, 819 F.2d at 1100, 1108 (Fed. Cir. 1987). Accordingly, since base claim 44 is patentable for the reasons set forth above, it is respectfully submitted that all claims dependent thereon, dependent claims 45-59, are also patentable. It is respectfully requested that the rejection be reconsidered and withdrawn.

Notwithstanding the lack of a *prima facie* case, the Trahan Declaration submitted with the last response presented results of a product evaluation using a test panel of 30 women, who evaluated a product composition within the scope of the claims in the present application to Barker's composition and the McAtee multilayered product. A comparison to Zabotto could not be reproduced because the ingredients in Zabotto's composition are no longer commercially available and could not be obtained. The Declaration establishes that Applicant's commercial product, however, is superior to Barker's composition and McAtee's multilayered product.



During the aforementioned interview, the Examiner indicated that the showing in the Trahan Declaration was not commensurate in scope with the claimed subject matter. In particular, the composition did not cover the broad ranges for the emollient and surfactant in the claimed composition. The Examiner's attention is directed to Examples 1, 7, 20-22 in the specification as further evidence of the scope of the amount of emollient (about 35% to 60%) and the amount of surfactant (0.7 to 8%) produce the conditioning effects set forth in base claim 44.

Example 1 in the specification is substantially the same composition as set forth in the Trahan Declaration. The amount of emollient is about 35% in both Example 1 and the Trahan Declaration and the amount of surfactant in Example 1 and the Trahan Declaration is 0.7% and 1%, respectively. Example 7 describes a composition comprising 41% of an emollient and 4% of a surfactant. The composition is described as being stable cream and "softens, smooths and moisturizes the skin when it is applied thereto ...." These are properties set forth in base claim 44. Compare the properties of Example 7 to Examples L, M and N of the Trahan Declaration. Examples 20-22 describe compositions containing 45 to 55% emollient and an amount of surfactant ranging from 3.5% to 8%. The compositions are described as forming "substantially stable creams that are effective to soften, smooth, moisturize and cleanse the skin when used in the claimed manner." Again, these are claimed properties. Also compare these properties to Examples L, M and N of the Trahan Declaration. Other examples in the specification that support the scope of the claims include Examples 17-19.

The data from the Trahan Declaration and the Examples from the specification would have led a person of ordinary skill in the art to conclude that there is a reasonable expectation

that the results shown in the Trahan Declaration would be expected for the entire range of the emollient and surfactant contained in the claimed composition set forth in base claim 44.

Notwithstanding the above, the commercial hand recovery product covered by the claims of the present application has been a commercial success for Carbtree & Evelyn as evidenced by the Supplemental Declaration of Lauren Trahan, which is attached to this response. In the past 4 years, almost 390,000 hand recovery units have been sold. The sales represent at least 2% of the total sales of Crabtree & Evelyn products.

For all of the foregoing reasons, the claim composition is patentable.

### **CONCLUSION**

For the foregoing reasons, it is submitted that the claims 44-59 are patentable over the teachings of the prior art relied upon by the Examiner. Accordingly, favorable reconsideration of the claims is requested in light of the preceding amendments and remarks. Allowance of the claims is courteously solicited.

If there are any outstanding issues that might be resolved by a further interview or an Examiner's amendment, the Examiner is requested to call Applicant's attorney at the telephone number shown below.

To the extent necessary, a petition for an extension of time under 37 C.F.R. § 1.136 is hereby made. Please charge any shortage in fees due under 37 C.F.R. § 1.17 and due in

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connection with the filing of this paper, including extension of time fees, to Deposit Account 500417 and please credit any excess fees to such deposit account.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Cameron Weiffenbach', written in a cursive style.

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